89-1526

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SOCIALIST WORKERS PARTY, et al.,
Petitioners,

vs.

KEN HECHLER, Secretary of State of West Virginia; et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH COURT

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QUESTIONS PRESENTED

1. Whether a May deadline for third party candidates to file nominating petitions and signatures to obtain access to the general election ballot for offices other than president and vice-president violates the First and Fourteenth Amendments rights of third parties, their candidates, and their supporters when the major parties have until sixty days before the election to complete their nominations.

2. Whether West Virginia 3-5-23 & -24, which make a voter's signature on a third party candidate's nominating petition exclusive of a vote in the primary but do not allow the candidate to solicit signatures after the primary, violates the First and Fourteenth Amendment rights of third parties, their candidates, and their supporters by imposing a substantial and unnecessary burden on their ability to gain access to the general election ballot.

3. Whether requiring third party candidates who cannot afford filing fees to submit two different petitions with supporting signatures, with one petition to be filed in early April and the other in early May, as a condition for gaining access to the general election ballot in November violates the First and Fourteenth Amendment rights of third parties, their candidates, and their supporters.

LIST OF PARTIES

The plaintiffs in the district court, appellants in the Court of Appeals for the Fourth Circuit, and petitioners before this Court are identified as follows:

Socialist Workers Party;
George Richard McBride;
James Kenneth Gotesky;
Elvena Elizabeth Brady;
Cleve Andrew Pulley;
Toba Leah Singer.

The defendants in the district court, appellees in the Court of Appeals for the Fourth Circuit, and respondents before this Court are identified as follows:

Ken Hechler, in his official capacity as Secretary of State and Member, State Election Commission;
Allan Hammock, Barbara Ruley, Ben Bryant, and Perry Reed, in their official capacity as members of the State Election Commission.

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OPINIONS BELOW

The decision for the Fourth Circuit Court of Appeals appears as Socialist Workers Party v. Hechler, 890 F.2d 1303 (1989). The district court's opinion was published as Socialist Workers Party v. Hechler, 696 F. Supp. 190 (S.D.W.V. 1988).

JURISDICTIONAL GROUNDS

This Court has jurisdiction under 28 U.S.C.§ 1254(1) to review the decision of the Fourth Circuit Court of Appeals. The Fourth Circuit rendered its decision on November 29, 1989, and denied the petition for rehearing on December 28, 1989.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners rely on the First and Fourteenth Amendments to the United States Constitution to challenge the validity of West Virginia Code 3-5-8a, 3-5-23, and 3-5-24. Those sections and other relevant provisions of the West Virginia Code are set forth in the appendix to this petition.

STATEMENT OF THE CASE

The Socialist Workers Party (SWP or the party) is a political party that attempts to influence public policy by, among other things, nominating candidates to public office in West Virginia and other states and disseminating its platform, principles, and positions on current issues. The party sought to place its candidates on the 1988 general election ballot in West Virginia. It filed this action to achieve that end and was joined in the effort by its state party chairman; its candidates for president, vice-president, United States senator, United States representative for the third congressional district of West Virginia, and West Virginia secretary of state; and one of its supporters who desired to vote for the party's candidates in the general election.

The SWP failed to poll at least ten percent of the vote in the 1984 gubernatorial election in West Virginia. Thus, to place its candidates on the November, 1988, general election ballot, the party had to qualify through nominating petitions. That procedure is outlined in West Virginia Code 3-5-8, - 8a, -23, and -24.

The first step in that process was for each of the party's nonpresidential candidates to file a certificate of candidacy and pay a filing fee equivalent to one percent of the salary paid for the office sought by the candidate. West Virginia Code 3-5-23(a); 3-5-8. Neither the SWP nor any of its candidates could afford the filing fees, so petitioners were relegated to the provisions of 3-5- 8a. That section waives the fee requirement for a candidate who lacks the resources to pay the fee if he files a petition supported by enough signatures

of registered voters to equal or exceed the total of four times the dollar amount of the filing fee. West Virginia Code 3-5-8a. (In this case, petitioners would have needed 8,000 signatures for the presidential and vice-presidential candidates, 3,580 for the congressional candidates, and 1,728 for the candidate for secretary of state.) The certificate of candidacy and the petition-in-lieu- of-filing-fee must be submitted no later than thirty-one days before the primary, which in 1988 was April 9th.

In addition to the petition-in-lieu-of-filing-fee, the SWP candidates had to solicit signatures for a nominating petition. The signatures on the fee waiver petition could not be counted towards the nominating petition. Id. The State's election code sets forth detailed provisions regulating the petitioning process. In gathering signatures, a candidate's solicitors must have credentials issued by the county clerk. If the sought-for elective office represents more than one county, separate petition forms must be used for signatures of the voters for each county, and the petitions must be presented within the political division represented by the office sought. Nominating petition signators must be registered voters and live in the political division represented by the office sought. West Virginia Code 3-5-23(b).

To qualify for the ballot, a candidate's petition has to be endorsed by no less than one percent of the total vote cast at the last general election for the office sought. Candidates for other than president or vice-president must file their nominating petitions by the day before the primary, which in 1988 fell on May 10th. West Virginia Code 3-5-23(c).

Voters who subscribe to a nominating petition forfeit their right to vote in the primary election. The nominating certificates signed by the voters must include language stating that fact, and the canvasser must read that language to each voter whose signature is solicited. The certificate must also declare that the subscribers "desire to vote" for the candidate named on the certificate. West Virginia Code 3-5-23(c) & (d). (The Fourth Circuit struck down the "desire to vote" requirement in its opinion below. 890 F.2d at 1308-10.)

Minor party presidential and vice-presidential candidates have until July 2 to submit their declarations of candidacy and until August 1 to file nominating petitions. West Virginia Code 3-5-23(a). Otherwise, such candidates are subject to the same regulations as are candidates for other offices.

The major political parties select their presidential and vice-presidential candidates for the ballot at conventions in late July to mid-August. Those parties may also fill vacancies on their slate for the general election ballot at any time up to the sixtieth day preceding the general election. West Virginia Code 3-5-19.

Having encountered substantial obstacles in this system to securing access to the general election ballot in November, 1988, petitioners filed this action in the district court for the Southern District of West Virginia, invoking that court's jurisdiction under 28 U.S.C. § § 1331 & 1343.

ARGUMENT

I. THE CIRCUIT COURTS ARE IN CONFLICT OVER THE IMPORTANT QUESTION OF WHETHER THIS COURT'S DECISION IN ANDERSON V. CELEBREZZE APPLIES TO AND REQUIRES INVALIDATION OF EARLY FILING DEADLINES FOR OFFICES OTHER THAN PRESIDENT.

In Anderson v. Celebrezze, 460 U.S. 780 (1983), this Court invalidated an Ohio law that required independent candidates for president and vice-president to declare their candidacies in the March preceding a November election. The Court found the state's rationales for its early deadline to be insufficient to justify the "substantial impact" that early filing deadlines can have on the rights of independent candidates and their supporters. Id. at 790, 806. Based upon that holding and the Anderson reasoning, petitioners in this case challenged the West Virginia election code to the extent it required them to file their petitions-in-lieu-of-a-filing-fee in early April and their nominating petitions in early May while permitting the major parties to nominate candidates as late as sixty days before the general election.

Although Anderson primarily emphasized the vital role that independents and third parties play in our political process and the disadvantage they suffer from early filing deadlines, it also noted that the challenge in that case came in the context of a presidential election, which "implicate[d] a uniquely important national interest." Id. at 1573.

Both before and since the Anderson decision, the lower federal courts have consistently been presented by minor political parties with the question of whether early filing deadlines for nonpresidential candidates are constitutional. Those courts have also consistently produced distinctly conflicting answers to the question. The weight of the authority has concluded the early deadlines are invalid. Blomquist v. Thomas, 739 F.2d 525 (10th Cir. 1984); Goldman-Frankie v. Austin, 727 F.2d 603 (6th Cir. 1984); McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980); Libertarian Party of Nevada v. Swackhamer, 638 F. Supp. 565 (D. Nev. 1986); Cripps v. Seneca Co. Bd. of Elections, 629 F. Supp. 1335 (N.D. Ohio 1985); Stoddard v. Quinn, 593 F. Supp. 300 (D. Me. 1984); Greaves v. State Bd. of Elections, 508 F. Supp. 78 (D.N.C. 1980); Whig Party of Alabama v. Siegelman, 500 F. Supp. 1195 (N.D. Ala. 1980); American Party of Arkansas v. Jernigan, 424 F. Supp. 943 (D. Ark. 1977)(3-judge court); Salera v. Tucker, 399 F. Supp. 1258 (D. Pa. 1976)(3-judge court), aff'd, 424 U.S. 959 (1976). See also Bergland v. Harris, 767 F.2d 1551 (11th Cir. 1985); LaRouche v. Burgio, 594 F. Supp. 614 (D.N.J. 1984)[1]. Most of the decisions rendered after Anderson have specifically rejected any notion that there should be a different constitutional standard for nonpresidential candidates.

There has also developed a significant, albeit smaller, body of contrary decisions on this issue. In addition to the two opinions by the lower courts in the present litigation, see McLain v. Meier, 851 F.2d 1045 (8th Cir. 1988); Rainbow Coalition v. Oklahoma State Election Bd., 844 F.2d 740 (10th Cir. 1988); Libertarian Party of Missouri v. Bond, 764 F.2d 538 (8th Cir. 1985); Libertarian Party of Florida v. Florida, 710 F.2d 790 (11th Cir. 1983). See also Dart v. Brown, 717 F. 2d 1503 (7th Cir. 1983); Stevenson v. State Bd of Elections, 638 F. Supp. 547 (N. D. Ill. 1986), aff'd, 794 F. 2d 1176 (7th Cir. 1986).

The early deadlines not only threaten the prospects for electoral success of third parties; by forcing the parties into the arena before the personalities and issues of the campaign have developed, the deadlines also prevent those parties from fulfilling their vital roles in our political process of providing alternatives to major party candidates, pushing the latter candidates to address the important issues, and generating new ideas. The early deadline is particularly burdensome in West Virginia because it is combined with a provision that forfeits the right to vote in the primary of any person who signs a nominating petition. (See Part II, infra.) The burdens of the early deadlines fall upon state and local third party candidates and damage the political process at the state and local level as drastically as they did before Anderson in presidential elections. Indeed, the need for constitutional protection for third parties may be even greater in nonpresidential elections; a third party must depend on grass roots efforts taking hold at the local level before its movement can have an impact on a broader scale.

The legitimacy of the early deadlines thus presents an issue of crucial significance to third parties, independent-minded voters and candidates, and the political process. The frequency with which the issue has been litigated, as demonstrated by the above cited cases, is testament enough to its importance. Because of that importance and the conflict it has generated in the lower court litigation, this Court should grant the petition for certiorari and resolve the matter.

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[1] Numerous unreported decisions have also voided early deadlines for nonpresidential, third party or independent candidates. Lendall v. McCuen, No. LR-C-88-311 (E.D. Ark. 1988); Libertarian Party of Hawaii v. Waihee, No. 86-0439 (D. Hawaii 1986); Denny v. Eyrich, No. C-1-84-531 (S. D. Ohio 1984); Warrick v. Condre, No. IP 83-810-C (S.D. Ind. 1983); Sigler v. McAlpine, No. 3AN-88-8695 CI (Alas. Super. Ct. 1988); Serrette v. Connolly, No. 68172 (mass. Super. Ct.).

II. THE FOURTH CIRCUIT'S DECISION BELOW CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. Contrary to This Court's Ballot Access Doctrines, the Fourth Circuit Ignored the Unjustified and Devastating Impact on Minor Political Parties, Their Candidates, and Their Supporters Resulting from West Virginia's Election Law Provisions That Make Signing Nominating Petitions and Voting in the Primary Exclusive But Fail to Allow Candidates to Gather Signatures After the Primary.

In 1923, West Virginia enacted the current § 3-5-23, which provides that any person who signs a nominating petition cannot vote in the primary. As noted in Part I, infra, § 3-5-24 also required that nominating petitions be filed on the eve of the primary election. The combination of those two provisions has virtually knocked third parties out of West Virginia politics.

From 1923 until 1980, only three third party presidential candidates (Henry Wallace, 1948; George Wallace, 1968; and Ed Clark, 1980) and one independent presidential candidate (John Anderson, 1980) qualified for the ballot in West Virginia. Note, Ballot Access Laws in West Virginia -- A Call for a Change, 87 W. VA. L. REV. 809, 820 (1985). There were no minor party nominees on the ballot for governor or United States Senator in that period.[2] By contrast, in 1982 and 1984, when the Secretary of State permitted post-primary signature-gathering in order to avoid a conflict with the holding in Anderson v. Celebrezze, the minor political parties managed to at least crack the previously near-impregnable wall around the ballot. Three of their presidential candidates qualified for the ballot in 1984 (Socialist Worker Mel Mason, the Populist Party's Bob Richards, and Independence Alliance candidate Dennis Serrette), and the Socialist Workers Party qualified its candidates for the ballot in the 1982 races for United States Senator and House of Representatives and in the 1984 senatorial contest.[3] In 1986, the legislature amended 3-5-23 to conform the Code to Anderson, giving that decision its

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[2] Petitioners' research has not discovered any minor party candidate on the ballot for any office other than president between 1923 and 1980.

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[3] The information on elections was extracted from Volumes 8 through 17 of AMERICA VOTES: A HANDBOOK OF CONTEMPORARY AMERICAN ELECTION STATISTICS and CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS (2nd. ed.).

narrowest possible reading. For the 1988 election, then, only presidential candidates could petition after the primary, and third party candidates for all other offices were once again confined to solicit prior to the primary. Not coincidentally, the only minor party nominee to make the ballot in West Virginia was the New Alliance Party's candidate for president.

The actual effects of a ballot access regulation is the best evidence of the extent of its burden, and the above history clearly demonstrates that the combination of the primary vote forfeiture provision and the primary eve deadline have erected a nearly insurmountable obstacle for minor political parties to gain access to West Virginia's general election ballot. That history cannot be ignored: "The Constitution requires that access to the electorate be real not 'merely theoretical.'" American Party of Texas, 415 U.S. at 783, quoting Jenness v. Fortson, 403 U.S. 431 (1971).

It is easy to see why the exclusivity provision and early filing deadline have had such a drastic effect. Voters are not willing, prior to the primary, to surrender their right to vote on all the major offices in order to place one or a handful of third party or independent candidates on the ballot. The situation is especially severe in West Virginia, where one party dominates the state level and most all of the counties, thus giving the primaries a far greater importance than in other states. These facts operate in a subtle yet particularly invidious way against smaller and new parties because it makes access to the general election ballot totally impossible for anyone who seeks office at the local level or in the state legislature. Political success often starts at the grass roots level and builds on reputation and name recognition gained through performance in local offices. But voters are not, in advance of the primary, going to forego their right to express themselves on who should be president, vice-president, senator, congressman, etc., just to get a Socialist Worker candidate for county commission on the ballot -- no matter how much they liked him or her.

The West Virginia procedure is completely different from that which this Court upheld in American Party of Texas v. White, 415 U.S. 767 (1974). Under the Texas law at issue there, a minor party could nominate for the general election ballot through precinct conventions if it could establish that at least one percent of the voters from the last gubernatorial election participated in the conventions. If the party could not show that level of participation, then Texas gave it a "second chance" to reach the one percent level by petitioning for signatures during a 55 day period after the primary. The number of signatures was then added to the convention totals to determine if the one percent figure was reached.[4] Not surprisingly, minor parties (including

the Socialist Workers Party) were able to qualify for the ballot under that system, and this Court reasonably concluded that it did not impose "an insurmountable obstacle" to a small party. 415 U.S. at 784.

The difference between the Texas and West Virginia laws is crucial: Texas permitted post-primary signature gathering and West Virginia does not. Confining signature gathering to the pre-primary period, combined with a primary vote forfeiture, puts the vast majority of voters beyond the reach of the canvassers because voters will not, prior to the fact, forego their right to vote in the primary. After the primary, of course, those who did not vote sacrifice nothing by signing a petition and listening to the arguments of third party canvassers.

Not surprisingly, no other state (according to petitioners' research) makes voting in the primary and signing a nominating petition exclusive without providing for a post-primary solicitation period. That may be explained by the fact that the state's interests in having an exclusivity provision can still be fully served if canvassing is permitted after the primary. As established in Anderson v. Celebrezze, when the Court evaluates "the legitimacy and strength of [the State] interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." 460 U.S. at 789. Because it is unnecessary to burden petitioners' rights at all to accomplish the State's purposes, let alone to burden the rights in so drastic a fashion as § § 3-5-23 & -24 do, the Fourth Circuit's decision upholding those sections clearly conflicts with this Court's ballot access decisions.

B. West Virginia's Requirement that Third Party and Independent Candidates Who Cannot Afford to Pay the Applicable Filing Fee Must Submit Two Petitions With Supporting Signatures Imposes on Such Candidates a Substantial Yet Needless and Silly Burden on Their Right To Compete for a Position on the General Election Ballot.

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[4] The Supreme Court described the Texas system as follows:

> [A minor political party] is entitled to compete before the primary election and to count noses at its convention on primary day, just as the major parties and their candidates count their primary votes. Furthermore, should they fall short of the magic figure, they have another chance -- they may make up the shortage and win ballot position by circulating petitions for signatures for a period of 55 days beginning after the primary and ending 120 days prior to the general election.

415 U. S. at 784 (emphasis in original).

In West Virginia Libertarian Party v. Manchin, 270 S.E.2d 634 (W.Va. 1980), the West Virginia Supreme Court of Appeals invalidated the filing fee requirement in West Virginia Code 3-5-8 as applied to candidates without the financial resources to pay the fee. In response to that decision, the Secretary of State issued a regulation allowing an impecunious candidate to file a candidacy certificate without paying the fee if he also submitted "a financial hardship affidavit." That regulation was struck down on vagueness grounds in Garcelon v. Rutledge, 318 S.E.2d 622 (W.Va. 1984). Thereafter, the West Virginia legislature enacted Section 3-5-8a, which permits the waiver of the filing fee for candidates who lack the necessary financial resources and who submit petitions bearing signatures of a sufficient number of qualified voters. The number of signatures required is four times the dollar amount of the filing fee for the office sought by the candidate. The legislature also provided, however, that "[s]ignatures obtained on an in-lieu- of-filing-fee petition shall not be counted toward the number of voters required to sign a nomination certificate in accordance with section [3-5-23]."

As structured, the petition requirement unnecessarily burdens appellants' political rights and unconstitutionally discriminates between indigent and other minor party candidates and between minor and major party candidates. Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972); Manchin, supra.

The purposes of the filing fee and the petition-in-lieu-of-the-filing-fee are to prevent spurious candidacies and protect the integrity of the electoral system. Lubin; Bullock. These are undeniably legitimate governmental ends. The petition alternative furthers that goal by requiring candidates to demonstrate their support and undertake the substantial effort of gathering a rather large number of signatures. Accordingly, Section 3-5-8a makes perfectly good sense as applied to major party candidates. But it makes no sense at all when applied to third party candidates who must also submit separate petitions demonstrating their support under Section 3-5-23.

Undeniably, petition requirements impose significant burdens on minor parties and their candidates. When reasonable, however, they are sustained to vindicate the State's legitimate interests in maintaining the integrity of its electoral processes by requiring candidates to prove their seriousness and show some modicum of support. But the State goes way beyond what is necessary to accomplish its purpose when it requires certain candidates -- distinguished by their political affiliation and their indigence -- to establish their case **twice**. Yet that is exactly what West Virginia has done because 3-5-8a does not allow signatures collected on the fee petition to count towards the nominating petition. The State cannot, therefore, rely on its interest in preserving the integrity of the electoral process to justify the double petition requirement imposed upon the candidates in this case.

The Fourth Circuit's decision upholding 3-5-8a as applied to the petitioners failed to identify any interest served by that provision that is not also served by the requirement in 3-5-23 for a nominating petition. Thus, that court's conclusion directly conflicts with Anderson's directive that the "State may not choose means that unnecessarily restrict constitutionally protected liberty." 460 U.S. at 806. Accord, e.g., Eu v. San Francisco County Democratic Central Comm., ___ U.S. ___, 109 S.Ct. 1013, 1020, 1025 (1989). The court of appeals concluded the statute was constitutional because it did not impose a significant burden on petitioners' rights. Of course, any burden would be unconstitutional under Anderson and Eu if it has absolutely no justification for its existence. More to the point, however, any canvassing that requires solicitation of thousands of signatures is not an insignificant burden. In this case, the SWP candidates for president and vice-president needed 3,580 signatures to satisfy 3-5-8a, the congressional candidates had to have 3,580 signatures, and the candidate for secretary of state needed 1,728. The burden is substantially exacerbated, too, by the statute's requirement that the petitions in-lieu-of-a-filing fee be turned in a month before the primary. Thus, the petitioners must conduct their 3-5-8a canvassing at a time when signatures are the most difficult to obtain.

Accordingly, the Fourth Circuit's conclusion that § 3-5-8a is constitutional is in direct conflict with the applicable decisions of this Court.

CONCLUSION

This Court should grant this petition for certiorari to resolve serious conflicts among the lower courts over important questions affecting fundamental rights and to correct the erroneous conclusions reached by the Fourth Circuit.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2199

SOCIALIST WORKERS PARTY; GEORGE RICHARD MCBRIDGE; JAMES KENNETH GOTESKY; ELVENA ELIZABETH BRADY; CLEVE ANDREW PULLEY; TOBA LEAH SINGER,

Plaintiffs - Appellants

v.

KEN HECHLER, in his official capacities as Secretary of State of West Virginia and Member, State Election Commission Office of Secretary of State; ALLAN HAMMOCK, in his official capacity as Member, State Election Commission Office of Secretary of State; BARBARA RULEY, in her official capacity as Member, State Election Commission Office of Secretary of State; BEN BRYANT, in his official capacity as Member, State Election Commission Office of Secretary of State; PERRY REED,

Defendants - Appellees

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, Jr., District Judge. (C/A No. 2:88-0499)

Argued: May 13, 1989 Decided: November 29, 1989

Before HALL and WILKINSON, Circuit Judges, and WILLIAMS, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Robert Milton Bastress, Jr., for Appellants. Robert Eugene Wilkinson, Special Assistant Attorney General, for Appellees.

WILLIAMS, Senior District Judge:

Appellants, the Socialist Workers Party and five individuals, brought suit against the members of the West Virginia State Election Commission alleging that certain provisions of the state's election laws are unconstitutional. Specifically, they object to the provision that individuals who sign nominating petitions for minor party candidates thereby lose their right to vote in the primary election; the requirement that minor party candidates must file their certificates of candidacy a month before the primary and their nominating petitions the day before the primary; the requirement that a candidate who cannot afford a filing fee submit a petition a lieu of the fee separate from the nominating petition; and finally the requirement that persons who sign nominating petitions state that they "desire to vote" for the candidate named in the petition.

The district court, in a lengthy and detailed opinion, upheld all of the challenged provisions, and the plaintiffs now bring this appeal.

I.

Challenges by third parties and independent candidates of various state regulatory schemes are no longer novel. The Supreme Court has held that voters have the right under the First and Fourteenth Amendments to cast their ballots effectively, Williams v. Rhodes, 393 U.S. 23, 30 (1968) (Black, J.), and that "[t]he right to form a party . . .means little if [it] can be kept off an election ballot and thus denied an equal opportunity to win votes." Id. at 31. The exclusion of all but major-party candidates from the ballot heavily burdens the right to vote since all voters want to be able to vote for someone who reflects their views on the issues of the day. Id.; Lubin v. Panish, 415 U.S. 709, 716 (1974). However, these general principles are not to be interpreted as an open sesame for minor parties and individuals who want to appear on the ballot with the major candidates,

> The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates.

Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983); Jenness v. Fortson, 403 U.S. 431, 442 (1971).

Because of the wide variation in the approaches of different states to the problem of ballot access, the Supreme Court in Anderson laid down a balancing test to determine the constitutional validity of the various state schemes. A court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made."

460 U.S. at 890-90 (citation omitted).

II.

The district court proceeded to examine the challenged provisions of West Virginia's elections laws in light of the Anderson standard. It found that the statute, W. Va. Code § 3-5-24(c) and (d), which forces voters to choose between signing a nominating petition and voting in the primary election was proper, citing American Party of Texas v. White, 415 U.S. 767 (1974), in which the Supreme Court sustained a similar provision of the Texas election code on the grounds that there is "nothing invidious in disqualifying those who have voted at a party primary from signing petitions for another party seeking ballot position for its candidates for the same offices." Id. at 786.

Plaintiffs, however, point to a difference between the West Virginia scheme and the Texas statute upheld by the Supreme Court in White. In Texas, a third party which fails to garner enough support at its nominating convention on primary day "may make up the shortage and win ballot positions by circulating petitions for signature for a period of 55 days beginning after the primary and ending 120 days prior to the general election." Id. at 784. It is the lack of such a second chance in West Virginia which the plaintiffs see as "impos[ing] a substantial, overbroad, and unnecessary burden" on their access to the ballot.

The plaintiffs complain that the lack of a post-primary makeup period for gathering signatures burdens them in two ways: first, contrary to the district court's supposition, the fact that only about 50% of the West Virginia electorate participates in the primary does not automatically mean that the other 50% will be available for signing nominating petitions because many of those people will not be willing to abandon their right to vote in the primary until the last minute, if at all. Second, the act of signing a nominating petition for a candidate in one race results in the loss of the right to vote on primary day in other races as well. This places a substantial burden on minor parties and independent candidates which is not balanced, according to the plaintiffs, by any corresponding state interest.

This argument is substantially undermined by a close look at the relevant precedents. The situation which obtained in American Party of Texas v. White is not so simple as plaintiffs suggest. There, Texas election laws provided the following system for candidates whose party polled less than two percent of the vote at the preceding election to get on the ballot: first, the party was required to hold precinct, county, and state conventions to nominate candidates and had to evidence support by persons numbering at least one percent of the total vote cast for governor at the preceding general election, by preparing a list of the qualified voters and sending it to the Secretary of State within twenty days. 415 U.S. at 777. If this were insufficient, only then would the petition process kick in. The party might gather signatures from qualified voters who had not participated in the primary. They must, however, have taken an oath stating, inter alia, that they were qualified voters who have not participated in the primary.

The West Virginia Supreme Court, contrasting the Texas scheme with their own, stated, "We cannot help but believe that our straight forward signature petition standard is much less burdensome than the Texas precinct convention and second chance scheme." West Virginia Libertarian Party v. Manchin, 270 S.E.2d 634, 646 (W. Va. 1980).

On balance, we agree with the West Virginia Supreme Court and the district court. The state interest in regulating the number of candidates on the ballot in order to avoid voter confusion, whether it be described as "important," Jenness v. Fortson, 403 U.S. at 442, or "compelling," American Party of Texas v. White, 415 U.S. at 782 n.14, is "generally sufficient to justify reasonable nondiscriminatory restrictions." Anderson v. Celebrezze, 460 U.S. at 788. It is not enough for the plaintiffs to make a limited comparison of the West Virginia scheme with the Texas scheme upheld by the Supreme Court in American Party, find some way in which the West Virginia plan is more restrictive, and therefore expect this court to declare it unconstitutional. The Supreme Court did not declare the Texas plan to be a paradigm, deviations from which are impermissible; it simply found it, taken as a whole, to

be within the bounds of the Constitution. Although it might be somewhat easier to collect signatures after the primary, as in Texas, rather than before, minor parties under the West Virginia plan are spared the necessity of having Texas-style precinct, county, and state conventions, a not inconsiderable burden in itself.

This view is bolstered by the holding in Jenness v. Fortson. There, the Supreme Court upheld a Georgia scheme very similar to West Virginia's. Georgia allowed the candidate of minor parties to win a place on the ballot by filing a nominating petition signed by five percent of persons eligible to vote in the last election for the particular office. 403 U.S. at 433. The candidate was allowed 180 days to gather the signatures, and the petition had to be filed by the same deadline as a candidate filing for a party primary. Although Georgia placed fewer restrictions on the right of an individual to sign a nominating petition -- for instance, a person who previously signed a petition could vote in the primary -- West Virginia's restrictions are balanced by the one percent requirement, as opposed to Georgia's five percent, and by the fact that there is no restriction in West Virginia on the length of time spent on gathering the signatures, while Georgia required this to be done no more than 180 days before the petitions were filed. Id.[1] To reiterate, we agree that, on balance, West Virginia's scheme is no more burdensome, and in some

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[1]Cf. Williams v. Rhodes, 393 U.S. 23 (1968), in which the Supreme Court struck down Ohio's elections laws, which in combination made it "virtually impossible for a new political party, even though it ha[d] hundreds of thousands of members, or an old party, which ha[d] a very small number of members, to be placed on the state ballot." Id. at 24. The Ohio statutory scheme was summarized by Mr. Justice Douglas in a concurring opinion as follows:

> Ohio, through an entangling web of election laws, has effectively foreclosed its presidential ballot to all but Republicans and Democrats. It has done so initially by abolishing write-in votes so as to restrict candidacy to names on the ballot; it has eliminated all independent candidates through a requirement that nominees enjoy the endorsement of a political party; it has defined "political party" in such a way as to exclude virtually all but the two major parties.
>
> A candidate who seeks a place on the Ohio presidential ballot must first compile signatures of qualified voters who total at least 15% of those voting in the last gubernatorial election. In this election year, 1968, a candidate would need 433,100 such signatures. Moreover, he must succeed in gathering them long before the general election, since a nominating petition must be filed with the Secretary of State in February. That is not all: having compiled those signa-

important respects is less burdensome, than those of other states which have been found constitutional.

The district court also affirmed § 3-5-23(c), which requires the number of signatures on a nominating petition to be, at a minimum, one percent of the votes cast for the office at the previous general election. Not only have one percent requirements been upheld by the Supreme Court, see Munro v. Socialist Workers Party, 479 U.S. 189, 198 (1986); American Party of Texas v. White, 415 U.S. at 783, but as noted earlier, Georgia's five percent requirement as well. Jenness v. Fortson, 403 U.S. at 442. The plaintiffs do not challenge the one percent requirement on appeal, but do say that combined with certain provisions of § 3-5-8(a), it violates Equal Protection and First Amendment rights. This last code section provides that indigent political

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tures, the candidate must further show that he has received the nomination of a group which qualifies as a "political party" within the meaning of Ohio law. It is not enough to be an independent candidate for President with wide popular support; one must trace his support to a political party.

To qualify as a party, a group of electors must participate in the state primary, electing one of its members from each county ward or precinct to a county general committee; two of its members from each congressional district to a state central committee; and some of its members as delegates and alternates to a national convention. Moreover, those of its members who seek a place the primary ballot as candidates for positions as central committeemen and national convention delegates must demonstrate that they did not vote in any other party primary during the preceding four years; and must present petitions of endorsement on their behalf by anywhere from five to 1,000 voters who likewise failed to vote for any other party in the last preceding primary. Thus, to qualify as a third party, a group must first erect elaborate political machinery, and then rest it upon the ranks of those who have proved both unwilling and unable to vote.

Id. at 35-37 (footnotes omitted).

The distinctions between the highly restrictive Ohio scheme and West Virginia's are far-reaching. Ohio ruled out independent candidacies; West Virginia does not. The requirements for qualifying as a political party, furthermore, were not only onerous but were virtually impossible for a small party to fulfill. The Supreme Court had little difficulty in finding such an electoral scheme unconstitutional. There is nothing about West Virginia's elections laws that creates such a crushing burden on minor parties.

candidates may obtain a place on the ballot without paying the statutory filing fee if, after filing an oath that they are unable to pay, they submit "in lieu-of-filing-fee petition forms" with the number of signatures equaling four times the dollar amount of the statutory fee. It also provides that none of the signatures gathered on this petition can be counted towards meeting the nominating petition minimum. In other words, the signatures obtained for one petition cannot take the place of signatures on the other, although the same people can sign both.

The appellant's position is that if they have proved their "seriousness" and a minimum level of support once, it is an unconstitutional burden on their political rights to make them prove the same thing, in effect, in a second petition.

The district court, in holding that the statute was constitutional, pointed out that the actual number of signatures required was small. It noted that plaintiffs McBride and Gotesky would be required to gather 3,580 signatures apiece, and plaintiff Brady only 1,728. The court, in applying the Anderson balancing test, found that the burden that obtaining this number of signatures imposed was modest, especially in comparison with the requirements of the in-lieu-of-filing-fee schemes of other states which have been upheld. Furthermore, those who sign this petition do not forfeit the right to vote in the primary, thus doubling the number of potential signatories. Finally, as noted earlier, although signatures gathered on the nominating petition cannot be counted towards meeting the in-lieu-of-filing-fee petition requirements, the difficulty of finding more signatories may easily be overcome by having the same people sign both petitions. Surely no one who would sign a nominating certificate would have any objection to signing an in-lieu-of-filing-fee petition. Therefore, the burden alleged by plaintiffs would appear to be de minimis. Thus there was no error in the district court's holding.

III.

The plaintiffs allege that the requirement contained in § 3-5-23(d), that a person who signs a nominating certificate must declare that "he desires to vote" for the named candidate, is unconstitutional. The district court, reading the subsection as a whole, interpreted this provision only as intending to insure that the subscribers realize that they are giving up their vote in the primary. We respectfully disagree.

Section 3-5-23(d) provides that "the content (of nominating certificates) shall include the language to be used in giving written and oral notice to each voter that signing of the nominating certificate forfeits that voter's right to vote in the corresponding primary election." This provision is entirely separate and apart from the requirement that subscribers state their "desire to vote" for the candidate. In our view there can be only one interpretation of this language in the mind of a subscriber: that since he had been told separately

that he cannot vote in the primary, the declaration of his intention to support the candidate can only apply to the general election.

Under West Virginia law, the signature of a voter on a nominating certificate is essentially another way of voting in the primary. The West Virginia Supreme Court of Appeals had held that "[although] the act of signing the [nominating] certificate does not constitute a vote in the usual sense, nor is the certificate a ballot . . . such act is so analogous to the voting process that it is entitled to the same consideration as a vote by ballot." State ex rel. Daily Gazette Co. v. Bailey, 152 W. Va. 521, 164 S.E.2d 414, 417 (1968). The same case also holds that signers of nominating certificates are "affirmatively making a nomination, which, if done in accordance with the appropriate statute, would succeed in placing their candidate on the ballot in the general election." 164 S.E.2d at 417.

Therefore, it seems that, in West Virginia, only those people who are members of a minority party, or of a group which has not yet become a party, are required to state as part of the nominating process that it is their intention to support a candidate in the general election. Thus, appellants object that their right to cast a secret ballot is violated by the desire-to-vote provision and that they are being denied equal protection of the law under the Fourteenth Amendment.

A. Secret Ballot

For a democracy to function, it is absolutely vital that citizens be free to vote for the candidate they choose. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 17 (1964). Although historically the "viva voce" (with the living mouth) election was common in the United States,[2] in this century most states, including West Virginia, have embraced the secret ballot, either statutorily or constitutionally, as an indispensable means of holding elections free from "violence, intimidation, bribery and other corrupt practices" which so often

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[2] "The right of a qualified citizen to vote as he pleases is certainly a fundamental right and is a basic concept in our system of government. Public voting subjected even the most hardy to pressure and also to violence. But it was never thought, or suggested, that public voting violated constitutional rights. The secret ballot does not seem to have appeared in this country until February, 1888, when the newly-devised Australian [ballot] system was adopted for municipal elections in Louisville, Kentucky." Barsky v. United States, 167 F.2d 241, 249 n.28 (D.C. Cir. 1948).

accompany elections where secrecy is not preserved. Anderson v. Mills, 664 F.2d 600, 608 (6th Cir. 1981). See also Taylor v. Bleakley, 55 Kan. 1, 39 P. 1045 (1895). In the recent case of Nabors v. Manglona, 829 F.2d 902 (9th Cir. 1987), for example, it was alleged that the defendants had "intimidated, coerced, and bribed numerous voters to obtain their votes," and that to insure the success of this alleged fraud, had ordered the voters to mark their ballots with secret code names. Id. at 904.

Although there have been no allegations of fraud in the instant case, the secret ballot also acts to protect another vital component of a democratic election: the ability to cast a ballot free from "scorn and ridicule." Anderson v. Mills, 664 F.2d at 608; Taylor v. Bleakley, 39 P. at 1049. In holding the desire-to-vote provision in Kentucky's election laws invalid, the Sixth Circuit noted that:

> The declaration operates to discourage citizens from participation in the electoral process simply because they do not wish people to know how they will vote. Such a revelation invokes the fears sought to be quelled by the secrecy of voting laws in this country, and subject an elector to the pressure of his neighbors, his employers, and social peers.

664 F.2d at 608-09.

Moreover, we believe that the effect of such a revelation can be substantial, in that it will discourage people from joining unpopular or controversial parties or causes.

West Virginia has enacted a statute, W. Va. Code § 3-1-4, providing that voters in all elections shall have the choice of voting with either an "open, sealed, or secret ballot."[3] Given the West Virginia Supreme Court of Appeals' own holding that the act of signing a nominating certificate is analogous to casting a ballot, this court can only conclude that forcing individuals to state that they desire to vote for a candidate before they can sign

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[3] It has been recognized that in some instances, such as when illiterate or blind voters need assistance in voting, the right to a secret ballot may be waived. See, e.g., United States v. Executive Committee of Democratic Party of Greene County, Alabama, 254 F. Supp. 543, 546 (N.D. Ala. 1966).

his nominating certificate is a clear infringement of their right to keep their vote and their political preference secret.[4]

B. Equal Protection

The Constitution of the United States, Article I, ¶ 4, states that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

The Supreme Court has said that

> the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as it may deem proper, provided of course, no discrimination is made between individuals, in violation of the Federal Constitution.

Carrington v. Rash, 380 U.S. 89, 91 (1964), quoting Pope v. Williams, 193 U.S. 621, 623 (1903).

In other words, the power of the states to determine the manner of holding elections is limited by the Equal Protection Clause of the Fourteenth Amendment. Since it is very clear that West Virginia is discriminating

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[4] The appellees suggest that because the West Virginia Supreme Court in Bailey ruled that the names of subscribers were secret, there is, in effect, no public declaration of voting preference. Although the Bailey court did say that names of subscribers would be available only to persons with a "sufficient interest," 164 S.E.2d at 418-19, it stopped short of saying that the names would not be available under any circumstances whatever. Furthermore, the dissent stated:

> In casting . . . a vote in a primary election, not even the election officials know how the voter votes. Any person soliciting signatures for the purpose of nominating a candidate by [petition] of necessity knows exactly whose names are contained thereon. Every signer on every petition after the first one has an opportunity to look at the other names on the petition, the secretary of state and all of his staff of necessity may examine the signatures, as well as every clerk of every

between those of its citizens who vote in primary elections to choose candidates for major parties, and those who choose to exercise their primary franchise through nominating certificates, the injuries to the appellants must be weighed against the justification offered by the state under the Anderson v. Celebrezze balancing test.

It is obvious that compelling disclosure of a person's intention to vote can have a substantial effect on the ability of small political groups to compete on the electoral battleground. A small party, already at a disadvantage to the organized battalions of the major parties and large pressure groups, must overcome three distinct hurdles due to the desire-to-vote requirement. First, because most people want to keep their vote secret, many potential subscribers will be reluctant to openly declare their voting preference in a nominating certificate. Second, many people will not have made up their minds early in an election year whom they will vote for in the fall. At the time the nominating certificates are being circulated, then, these people could not honestly say for whom they would like to vote. Furthermore, anyone even remotely connected with politics knows that voters have a right to change their minds and often do so as an election gets closer. Third, some individuals who have made up their minds, and who would ordinarily have no objection to stating their preferences, might be put off by the possible reaction to associating themselves with the more unpopular political groups.

The Sixth Circuit neatly summarized the Equal Protection difficulties of Kentucky's desire-to-vote requirement:

> It is only those electors wishing to sign a petition who must declare their desire to vote for a specific individual. Electors who support other candidates have to make no such public declaration. The chilling effect that such a practice has on associational and voting rights is obvious. The voting citizen must decide whether to sign the petition, having his political preference clearly and unmistakably disclosed, or to refrain from signing. A potential subscriber, who is uncertain about whom he will support in the general election, but with an interest in the candidate will be unable to sign a petition

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county court of this state and all of his staff have the right to examine the signatures that are alleged to be those of residents of the particular county.

Id. at 421 (Browning, J., dissenting).

> because of the requisite declaration. The impact to the candidate is equally drastic. He is unable to espouse his views because the declaration greatly curtails his ability to appear on the ballot and become widely known. The possibility of having new candidates with unusual and creative political philosophies is greatly reduced. As a result, this requirement fosters a system which favors the status quo, while discouraging independent candidates and new political parties.

664 F.2d at 609.

Against these injuries, the appellees assert only that the provision "is there to protect the voter . . . from inadvertently signing his primary nomination vote away." As stated earlier, we find this justification wholly unpersuasive. The state has already fully accomplished this goal by the requirement that each subscriber be given written and oral notice that he is forfeiting his right to vote in the primary by signing. Even if we assume that the appellees and the district court are correct and the declaration does not mean what it clearly says, the important thing is what the voter thinks. It is not enough to say what some court might interpret the provision to mean; it is the voter's rights which are being affected, not someone from the judiciary. Just as provisions that subscribers must take loyalty oaths to a party before putting their names on the party's nominating petitions have been struck down as violations of Equal Protection, Libertarian Party of Nebraska v. Beermann, 598 F. Supp. 57, 64 (D. Neb. 1984); Libertarian Party of South Dakota v. Kundert, 579 F. Supp. 735, 739 (D. S.Dak. 1984), we conclude that the appellees' interest in making voters disclose their voting preferences is neither legitimate nor strong, and in fact serves no purpose whatever, except to have a chilling effect on the voter. Therefore, it is a violation of the potential subscribers' First and Fourteenth Amendment rights.

For all of the above reasons, the judgment of the district court will be affirmed, except insofar as it held to be constitutional that portion of W. Va. Code § 3-5-23(d), which requires persons wishing to sign nominating certificates to state that they "desire to vote" for the candidate therein named.[5]

AFFIRMED IN PART
AND REVERSED IN PART

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[5] This ruling should not inconvenience election officials in West Virginia in 1990 since the only deletion from the petition is the "desire to vote" clause.

HALL, Circuit Judge, concurring in part and dissenting in part:

I concur in Sections I and II of the majority opinion which uphold the constitutionality of the basic framework of West Virginia's nomination petition process. I must dissent, however, from the majority's conclusion that the "desire to vote" language of W. Va. Code § 3-5-23(d) violates the First and Fourteenth Amendments as well as a voter's statutory right to cast a secret ballot.

I.

At the outset, I note my general agreement with the majority that if the "desire to vote" language actually forced a voter to reveal his voting preference in the general election, it would be constitutionally suspect. However, I do not join in the conclusion that the statute is unconstitutional because I do not read the statute to require such a revelation. Rather, I believe that a fair reading of this language in context with the balance of § 3-5-23 leads to the contrary conclusion that this language is nothing more than a declaration that voters who sign a nominating petition "desire to vote" for the candidate or candidates on that petition in the primary election. For support, I rely on the statute itself.

In regard to the content and form of a nominating certificate, § 3-5-23(c), (d) provide in part:

> No signature on each certificate shall be counted unless it be that of a duly registered voter of the county, district or other political division represented by the office sought wherein such certificate was presented. It shall be the duty of those soliciting signatures to read to each voter whose signature is solicited the statement written on the certificate which gives notice that no person signing such certificate shall vote at any primary election to be held to nominate candidates for office to be voted for at the election to be held next after the date of signing such certificate.

> (d) such certificates shall state the name and residence of each of such candidates; that he is legally qualified to hold such office; that the subscribers are legally qualified and duly registered as voters and desire to vote for such candidates; and may designate, by not more than five words, a brief name of the party which such candidates represent and may adopt a device or emblem to be printed on the official ballot. All candidates nominated by the signing of such certificates shall have their names placed on the official ballot as candidates, as if otherwise nominated under the provisions of this chapter.
>
> The secretary of state shall prescribe the form and content of the nomination certificates to be used for soliciting signatures. The content shall include the language to be used in giving written and oral notice to each voter that signing of the nominating certificate forfeits the voter's right to vote in the corresponding primary election.

(Emphasis added.) It seems clear to me that the "desire to vote language refers to a voter's act of signing the petition and its legal effect on the voter's eligibility to vote in the primary election. Contrary to the majority's assertion, the desire to vote language is not "entirely separate and apart" from the statute's requirement that voters be warned that joining the petition will forfeit their right to vote in the primary. Rather, this language is more reasonably interpreted as part of the West Virginia legislature's warning to voters about the consequences of signing the petition. Under this interpretation, the provision cannot run afoul of the right to cast a secret ballot because it forces the voter to state publicly nothing more than he has already stated publicly by signing the petition, that he desires to vote for the candidate or candidates on the petition in the primary election. Likewise, the provision does not violate the right of equal protection of law because the provision does not disadvan-

tage signatories of the petition relative to any other voters.[6]

Further, the majority's reliance on Anderson v. Mills, 664 F.2d 600 (6th Cir. 1987), is misplaced. While Mills appears to be on all fours with this case, it is not. The "desire to vote" clause in Mills. KRS § 118.315 (repealed 1988 Ky. Acts Ch. 17 § 11), could not have possibly served the same cautionary function as it serves in § 3-5-23(d) because the signatory of a Kentucky petition does not forfeit his primary vote.[7] Consequently, the only election the Kentucky statute could have been referring to was the general election.

In sum, I find the majority's interpretation of § 3-5-23(d) strained and unsupported. I also find it disappointing in view of the Supreme Court's repeated admonitions that courts should strive to interpret statutes as a whole, rather than focusing on a particular phrase or sentence, and that statutes should be interpreted to avoid constitutional difficulties. E.g., Webster v. Reproductive Health Services. ____ U. S. ____, 109 S. Ct. 3040, 3054 (1989). The majority's myopic focus on the "desire to vote" language, in disregard of these axioms of statutory construction, has led it to an erroneous result. Accordingly, I must dissent from sections III and IV of the majority opinion and would affirm the district court in all respects.

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[6] In fact, the "desire to vote" declaration of minor party petition signatories is analogous to West Virginia's requirement that major party members must publicly declare their party affiliation and vote in the primary only for candidates of their party. W. Va. Code 3-2-18. This analogy is even closer than one might think because in West Virginia, primary elections are often uncontested. Consequently, a declaration of affiliation with a major party is, for all intents and purposes, a declaration of for whom the voter desires to vote.

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[7] However, a voter can sign only one petition per office (except for the office of soil and water conservation district supervisors). KRS § 118.315(2).

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

SOCIALIST WORKERS PARTY,
GEORGE RICHARD McBRIDE,
JAMES KENNETH GOTESKY,
ELVENA ELIZABETH BRADY,
CLEVE ANDREW PULLEY, and
TOBA LEAH SINGER,

Plaintiffs,

v. Civil Action No. 2:88-0499

KEN HECHLER, in his official capacities as Secretary of State of West Virginia and Member, State Election Commission Office of Secretary of State; ALLAN HAMMOCK, in his official capacity as Member, State Election Commission Office of Secretary of State; BARBARA RULEY, in her official capacity as Member, State Election Commission Office of Secretary of State; BEN BRYANT, in his official capacity as Member, State Election Commission Office of Secretary of State; and PERRY REED, in his official capacity as Member, State Election Commission Office of Secretary of State,

Defendants.

MEMORANDUM ORDER

This matter is before the court on the cross motions for summary judgment filed by defendants Ken Hechler, Allan Hammock, Barbara Ruley, Ben Bryant and Perry Reed, and by the plaintiffs Socialist Workers Party, George Richard McBride, James Kenneth Gotesky, Elvena Elizabeth Brady, Cleve Andrew Pully and Toba Leah Singer.

1. Background

On April 13, 1988, plaintiffs filed a complaint against the defendants seeking declarative and injunctive relief from the restraints of certain sections of the West Virginia election laws which plaintiffs allege as being unconstitutional. Plaintiffs include the Socialist Workers Party, its chairman, Cleve Pulley,and Toba Singer,a duly registered voter of the State of West Virginia who desires to vote for Socialist Workers Party candidates in the November 1988 general election. The remaining plaintiffs are party members who seek to run for public office in that election, namely, George McBride, candidate for United States Senator, James Gotesky, candidate for United States Representative for the Third Congressional District, and Elvena Brady, candidate for Secretary of State of West Virginia. Defendants filed a motion for summary judgment. Plaintiffs filed a response and cross motioned for summary judgment. The parties filed a stipulation of facts on July 1, 1988, and have filed memoranda in support of their respective positions. There are no factual disputes on the record. Accordingly, the court will rule upon the purely legal question of whether certain sections of the West Virginia election laws are constitutional.

2. Discussion

Plaintiffs contend that Sections 3-5-8a, 3-5-23(a), (c), (d), and 3-5-24 of the West Virginia Code individually and collectively deprive plaintiffs of their political association and free speech rights in violation of the First and FourteenthAmendments to the United States Constitution.[1] West Virginia has in place comprehensive election laws regulating the procedure for

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[1] The Supreme Court has not drawn a clear line between its equal protection and due process analyses in this area. In Anderson v. Celebrezze, 460 U.S. 780 (1983), the Court noted:

independent and third party candidates to obtain ballot access. Political parties polling less than 10% of the total vote cast for governor at the immediately preceding general election may obtain access to the ballot by following the procedures outlined in § 3-5-23 for groups of citizens having no party organization or by nominating candidates at party conventions and submitting certificate nominations, commonly referred to as nominating petitions, in accordance with § 3-5-24. See W. Va. Code § 3-5-22. Under § 3-5-23, groups of citizens having no party organization must submit both a declaration of candidacy and nominating petitions. The declaration of candidacy must be filed no later than 31 days before the primary election. § 3-5-23(a). The nominating petitions must total no less than 1% of the total vote cast at the last general election for the office sought. § 3-5-23(c). The filing date for these petitions is no later than the day before the primary election is held. § 3-5-24. Candidates running for the offices of president and vice president must submit a declaration of candidacy no later than July 2, and submit nominating petitions no later than August 1. § 3-5-23(a). No limits are placed upon the date when candidates may begin collecting petitions. Nominating petitions must be signed by duly registered voters of the State of West Virginia. § 3-5-23(c). Voters who sign the petitions forfeit their right to vote in the primary. § 3-5-23(d).

Candidates must pay a filing fee equivalent to 1% of the annual salary for the office sought. § 3-5-8(a). Candidates who are unable to pay this amount may submit in-lieu-of-filing-fee petitions. § 3-5-8a. The number of signatures required is four qualified voters per each whole dollar. Id. The

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> In this Case, we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment. These cases, applying the "fundamental rights" strand of equal protection analysis, have identified the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates, and have considered the degree to which the State's restrictions further legitimate state interests.

Id. at 786-87 n.7 (citations omitted).

number of submitted petitions must be enough to waive the fee in whole; waiver in part is not permissible. Id. The signatures may be collected from the second Monday in January down to the date of submission which is 31 days prior to the primary. §§ 3-5-8a, 23(a). Voters are free to sign fee petitions and vote in the primary. § 3-5-8a. Candidates running for the offices of president and vice president must submit their fee petitions along with their declaration of candidacy no later than July 2. § 3-5-23(a).

The Supreme Court has recognized that under the First and Fourteenth Amendments, individuals enjoy the right to associate for political purposes, as well as the right of qualified voters to cast their votes effectively. See Williams v. Rhodes, 393 U.S. 23, 30 (1968). Restrictions upon the access of political parties to the ballot infringe upon these freedoms. However, as the Court in Anderson v. Celebrezze, 460 U.S. 780 (1983), observed:

> [N]ot all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates. We have recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic "processes." Storer v. Brown, 415 U.S. 724, 730 (1974). To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.

Id. at 788 (footnote omitted). In a footnote, the Court stated:

> We have upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral proc-

> ess itself. The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates.

Id. at 788-89 n.9 (citations omitted). To aid lower courts in distinguishing permissible from impermissible ballot restrictions, the Court established the following standard:

> Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. Storer, supra, at 730. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 789. See Libertarian Party of Virginia v. Davis, 766 F.2d 865, 867 (4th Cir. 1985), cert. denied, 475 U.S. 1013 (1986) (court applied balancing test set out in Anderson in upholding challenge to Virginia election laws requiring submission of petitions totalling .5% of all registered voters).

I.

Turning now to the statutory provisions in question, plaintiffs attack the validity of the state's statutory edict that forces voters under § 3-5-23(d)

into a choice between signing a nominating petition and voting in the primary.[2] In American Party of Texas v. White, 415 U.S. 767 (1974), the Supreme Court upheld the constitutionality of a similar provision in the Texas Election Code. The Court noted:

> We think the three-judge District Court in Jackson v. Ogilvie, 325 F. Supp. 864, 867 (ND Ill.), aff'd, 403 U.S. 925 (1971), aptly characterized the situation in upholding a state election law provision preventing a voter from both voting in the primary and signing an independent election petition:
>
> > "Thus, the state's scheme attempts to ensure that each qualified elector may in fact exercise the political franchise. He may exercise it either by vote or by signing a nominating petition. He cannot have it both ways."
>
> . . . At least where, as here, the political parties had access to the entire electorate and an opportunity to commit

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[2] Section 3-5-23(d) provides in pertinent part:

> The secretary of state shall prescribe the form and content of the nomination certificates to be used for soliciting signatures. The content shall include the language to be used in giving written and oral notice to each voter that signing of the nominating certificate forfeits that voter's right to vote in the corresponding primary election.

> voters on primary day, we see nothing invidious in disqualifying those who have voted at a party primary from signing petitions for another party seeking ballot position for its candidates for the same offices.

Id. at 785-86 (footnote omitted). See Tashjian v. Republican Party of Connecticut, 107 S. Ct. 544, 554 n.13 (1986); Anderson, 460 U.S. at 802 n.29. Applying the reasoning of the Court in American Party, the court concludes that § 3-5-23(d), prohibiting voters who sign nominating petitions from voting in the primaries, does not infringe upon the constitutional rights of plaintiffs. See also West Virginia Libertarian Party v. Manchin, 270 S.E.2d 634 (W. Va), appeal dismissed, Citizens Party v. Manchin, 449 U.S. 802 (1980), wherein the West Virginia Supreme Court of Appeals sustained the validity of § 3-5-23(d) against constitutional attack. Id. at 646-48.

Plaintiffs assert that § 3-5-23(d), by requiring a public declaration of voting or intention to vote, is unconstitutional.[3] Plaintiffs argue that if voters were required under § 3-5-23(d) to publicly declare their desire to vote for the named candidate in the general election, such a requirement would be unconstitutional. See Anderson v. Mills, 664 F.2d 600, 608-09 (6th Cir. 1981). The court, however, interprets § 3-5-23(d), read as a whole, to require

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[3] Section 3-5-23(d) prescribes that:

> Such certificates shall state the name and residence of each of such candidates; that he is legally qualified to hold such office; that the subscribers are legally qualified and duly registered as voters and desire to vote for such candidates;
>
> . . .
>
> The secretary of state shall prescribe the form and content of the nomination certificates to be used for soliciting signatures. The content shall include the language to be used in giving written and oral notice to each voter than signing of the nominating certificate forfeits that voter's right to vote in the corresponding primary election.

only a public declaration that the voter desires the nominating petition to take the place of his otherwise valid right to vote in the primary. As such, the stated desire by the voter operates as a necessary corollary to ensure that the voter is aware that he is giving up his right to vote in the primary, a ballot restriction that the Court has already upheld on numerous occasions as reasonable and nondiscriminatory. See American Party, 415 U.S. at 778 (Court upheld requirement in Texas that voters signing petitions sign an oath that they are registered voters and have not participated in any other party's nominating or qualification proceedings).

Section 3-5-23(c) states that "[t]he number of such signatures shall be equal to not less than one percent of the entire vote cast at the last preceding general election for the office in the state, district, county or other political division for which the nomination is to be made." Plaintiffs contend that the one percent requirement impermissibly burdens their rights to cast ballots effectively. A similar argument was rejected in Jenness v. Fortson, 403 U.S. 431 (1971), where the Court refused to invalidate a requirement under Georgia law that independent and minor party candidates submit nominating petitions totalling five percent of the votes cast in the previous election for the specific office sought in order to have their names placed on the ballot. Id. at 442. See Munro v. Socialist Workers Party, 107 S. Ct. 533 (1986) (1% requirement upheld); American Party, 415 U.S. 767 (1974) (same). In upholding the 5% requirement, the Court in Jenness reasoned:

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot -- the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

Jenness, 403 U.S. at 442. The requirement in West Virginia that plaintiffs compile one percent nominating petitions, no less than Georgia's stricter five percent requirement, plainly withstands constitutional attack.

II.

Plaintiffs next contend that a combination of the pre-primary filing deadlines for declaration of candidacy[4] and submission of nominating petitions,[5] coupled with the forced choice voters must make under § 3-5-23(d) to sign their petition or vote in the primary, constitutes an unconstitutional restriction on their access to the general election ballot in West Virginia. In evaluating this contention, the overall election scheme must be considered to determine whether ballot access has been impermissibly restricted. Libertar-

ian Party of Missouri v. Bond, 764 F.2d 538 (8th Cir. 1985).[6] The defendants rely on the analysis and holding in West Virginia Libertarian Party v. Manchin, 270 S.E.2d 634 (W. Va. 1980), wherein the West Virginia Supreme Court of Appeals sustained a constitutional challenge to identical provisions of the election laws. The reasoning of the Manchin decision in upholding the constitutionality of the West Virginia early filing deadline is to some extent undercut by subsequent holdings of the United States Supreme Court. Three years after Manchin was decided, the Court in Anderson struck down a similar Ohio preprimary filing deadline, as applied to Independent presidential

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[4] Section 3-5-23(a) stipulates the time for filing declaration of candidacy:

> Groups of citizens having no party organization may nominate candidates for public office otherwise than by conventions or primary elections. In such case, the candidate or candidates, jointly or severally, shall file a declaration with the secretary of state if the office is to be filled by the voters of more than one county . . . ; such declaration to be filed at least thirty days prior to the time of filing the certificate provided by section twenty-four [3-5-24] of this article.

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[5] Section 3-5-24 prescribes the time for submission of nominating certificates or petitions as follows:

> All certificates nominating candidates for office under the preceding section [3-5-23], including a candidate for the office of presidential elector, shall be filed, in the case of a candidate to be voted for by the voters of the entire state or by anysubdivision thereof other than a single county, with the secretary of state, .

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[6] The Eighth Circuit observed in Libertarian Party of Missouri, at 541:

> It has been recognized, however, that the entire election scheme must be analyzed to determine whether undue con-

candidate John Anderson.[7] In response to the Anderson decision, the West Virginia Legislature amended § 3-5-23(a) in 1986 to add "[p]rovided, That

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straints on access to the ballot exist. See, e.g., Mandel v. Bradley, 432 U.S. 173, 178, 97 S. Ct. 2238, 2241, 53 L.Ed.2d 199 (1977) (features of electoral system other than filing deadline, such as period of time to collect signatures and restrictions on pool of potential petition signers, must be considered); Storer v. Brown, supra, 415 U.S. at 738-39, 94 S. Ct. at 1283 (case remanded to analyze effect of 24-day period to collect signatures and effect of reduction of pool of potential signers by disqualification of those who had voted in the primary); Williams v. Rhodes, supra, 393 U.S. at 34, 89 S. Ct. at 12 ("totality of the Ohio restrictive laws taken as a whole" convinced Court to invalidate 15 percent signature requirement); McLain v. Meier, supra, 637 F.2d at 1164 ("facial validity of a signature requirement is but one indication of the constitutionality of a state's access provisions"; early filing deadline convinced court that 3 percent signature requirement was unconstitutional). Id. at 541.

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[7] In one sense, the Ohio statute at issue in Anderson is more burdensome than the West Virginia statute. Ohio required all independent candidates for statewide office to submit no later than 75 days before the primary a declaration of candidacy and nominating petitions. Anderson, 460 U.S. at 783 n.1. The West Virginia statute requires independent and third party candidates to submit no later than 31 days before the primary a declaration of candidacy and no later than the day before the primary the nominating petitions. But in another sense, the Ohio statute is less burdensome than the West Virginia statute. Candidates in Ohio are required to submit nominating petitions totalling no less than 5,000 and no more than 15,000 signatures. Although the Court in Anderson did not break down the required 5,000 votes into a percentage of votes cast in the last presidential election, the district court calculated the percentage to be .12%. See Anderson v. Celebrezze, 449 F. Supp. 121, 124 (S.D. Ohio 1980). Even if it were the case that only half as many voters participated in other statewide elections in Ohio, the required percentage would amount to but .24%. West Virginia requires 1%. Nevertheless,

the deadline for filing the certificate for persons seeking ballot access as a candidate for the office of president or vice president shall be filed not later than the first day of August preceding the general election." The preprimary deadline requirements for all other elective offices were left intact by the legislature. Defendants argue that the holding of Anderson is limited to ballot restrictions on independent and third party candidates running for president or vice president and is necessitated by the circumstance that the two major political parties do not select their nominees for those offices until the holding of their national party conventions in July and August.

The Court in Anderson relied upon several factors uniquely present in the context of a national election in striking down Ohio's early filing deadline. For example, the Court stressed the disadvantages third party and independent candidates faced in Ohio by having to declare their candidacies and begin to muster support five months before the major parties hold their conventions to adopt the chosen nominees and formulate party platforms. See Anderson, 460 U.S. at 790-91, where the Court noted:

> Ohio's filing deadline prevents persons who wish to be independent candidates from entering the significant political arena established in the State by a Presidential election campaign -- and creating new political coalitions of Ohio voters -- at any time after mid to late March. At this point developments in campaigns for the major-party nominations have only begun, and the major parties will not adopt their nominees and platforms for another five months. Candidates and supporters within the major parties thus have the political advantage of continued flexibility; for independents, the inflexibility imposed by the March filing dead line is a correlative disadvantage because of the competitive nature of the electoral process.

(Footnote omitted). Third party and independent candidates running for statewide and local elections in West Virginia are not disadvantaged in having to anticipate the outcome of the major party conventions occurring five months down the road because the major parties do not hold conventions for

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the two statutes are similar in the sense that both involve preprimary filing deadlines, a condition which the Court disavowed in Anderson with respect to presidential candidacies.

statewide and local elections in West Virginia. Indeed, third party and independent candidates are at an advantage in West Virginia by generally being afforded a later filing deadline to declare their candidacies than major party candidates. Compare § 3-5-23(a) (third party and independent candidates must file declaration of candidacy thirty one days prior to primary) with § 3-5-7 (major party candidates must file declaration of candidacy "not earlier than the second Monday in January next preceding the primary election day, and not later than the first Saturday of February next preceding the primary election day").

Further, by placing the deadline for submission of nominating petitions on the day before the primary, all potential candidates are placed on an equal footing in having to clamor for support during the same period of time before the primary election. See Munro v. Socialist Workers Party, 107 S. Ct. 533 (1986). The Washington election laws at issue in Munro allowed third party and independent candidates declaring their candidacies approximately two months before the primary election to automatically have their names placed on the ballot in the primary election. Only those candidates receiving at least 1% of the primary vote were eligible to have their names placed on the general election ballot. In sustaining the constitutionality of the Washington election scheme, the Court emphasized that states have always been able to require third party and independent candidates to demonstrate a modicum of community support in order to have their names placed on the general election ballot. The court concluded that requiring third party and independent candidates to make this showing prior to the primary by competing with the major party candidates on an equal footing to "get the vote out" does not unduly restrict access to the ballot. See Munro, 107 S. Ct. at 539.

Next, the Court in Anderson was concerned with the inter-dependency of the various election laws of the states in restricting ballot access of those candidates running for national office. The Court noted:

> [I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State

> has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries.

Anderson, 460 U.S. at 794-95 (footnotes omitted). Ballot restrictions placed upon third party and independent candidates running for statewide and local elections in West Virginia do not affect the outcome of elections held in sister states.

Further, Anderson involved a challenge by an independent candidate. In Storer v. Brown, 415 U.S. 724 (1974), the Court drew a distinction between independent and third party candidates in that "[a] new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office." Storer, 415 U.S. at 745. The Eleventh Circuit in Libertarian Party of Florida v. State of Florida, 710 F.2d 790 (11th Cir. 1983), cert. denied, 469 U.S. 831 (1984), relied upon Storer to justify imposing harsher restrictions on third party candidates so as to provide "assurance that the particular party designation has some meaning." Id. at 795.

The court finds on balance significant differences between national and statewide and local elections sufficient to preclude extending the holding of Anderson to statewide and local elections. See Rainbow Coalition v. Oklahoma State Election Board, 844 F.2d 740, 746 n.9 (10th Cir. 1988); Stevenson v. State Board of Elections, 638 F. Supp. 547, 552 (N.D. Ill. 1986), aff'd, 794 F.2d 1176 (7th Cir. 1986); Dart v. Brown, 717 F.2d 1491, 1503 (5th Cir. 1983), cert. denied, Libertarian Party of Louisiana v. Brown, 469 U.S. 825 (1984) ("The Court [in Anderson] was divided five to four, and the majority placed heavy emphasis on the strong national, and diminished state, interest in presidential elections").[8]

Although the holding of Anderson is limited to the context of a national election, the balancing test set forth in Anderson has been universally applied by lower courts in evaluating all challenges to election schemes

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[8] In Cripps v. Seneca County Board of Elections, 629 F. Supp. 1335 (N.D. Ohio 1985), the district court relied upon the Sixth Circuit's decision in Goldman-Frankie v. Austin, 727 F.2d 603 (6th Cir. 1984), in refusing to restrict the principles set forth in Anderson to only national elections. Cripps, 629 F. Supp. at 1298. However, the district court's reliance on Austin is questionable. The Sixth Circuit in Austin found that the total exclusion of access to the ballot by an independent candidate running for

restricting ballot access of third party and independent candidates running in national, statewide and local elections. As the Court stated, constitutional challenges to state election laws "cannot be resolved by any litmus-paper test." Anderson, 460 U.S. at 789. Accordingly, lower courts have applied a three-step analysis whereby the character and magnitude of the challengers' asserted interests are assessed, the interests put forward by the state to justify the burdens imposed are identified and evaluated, and the state's interest in a valid election system is measured against the necessity of burdening the challengers' right to run. Id.

Applying this analysis, it is stipulated that in the current election year, plaintiff McBride, seeking office as United States Senator, was required to file 7,222 nominating petitions; plaintiff Gotesky, seeking office as a United States Representative for the Third District, was required to file 1,135 nominating petitions; and plaintiff, Brady, seeking office as Secretary of State, was required to file 6,816 nominating petitions. In all challenges to ballot restrictions, the court in determining the overall burden placed upon candidates attempting to collect the prescribed number of signatures must consider the pool of available signers, the amount of time in which the signatures can be obtained, and the date of the filing deadline. See Developments, 88 Harv. L. Rev. at 1125 (1975).

West Virginia restricts the pool of available signers to registered voters who do not vote in the primary. This restriction is not an unusual one. The Supreme Court has upheld the constitutionality of election schemes forcing voters to choose between signing nominating petitions and voting in the primary. See American Party, 415 U.S. at 785-86.[9] The restriction cannot

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local school board election was invalid. Austin, 727 F.2d at 607. The defendants in Austin had argued that the prior decision by the Supreme Court in McCarthy v. Briscoe, 429 U.S. 1317 (1976), striking down the Michigan election laws for failing to provide ballot access to Eugene McCarthy running as an independent candidate for United States Senator, was not controlling because it involved a challenge by an independent candidate running for a federal office. Id. at 606-07. The court rejected limiting the Supreme Court's decision to federal elections, id., without discussing the Anderson decision or the important differences between national and statewide elections relied upon by the Court in Anderson.

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[9] Although the Court in American Party upheld the Texas provision requiring voters to choose between signing nominating petitions and voting in the primary, Texas, unlike West Virginia, did not impose the additional burden of forcing candidates to collect the signatures before the primary. American Party, 415 U.S. at 784.

be properly evaluated without reference to its effects on the pool of available voters. In the eleven presidential year primary elections in West Virginia from 1948 to 1988, the highest percentage of registered voters who voted in the primary was approximately 55%; the lowest was some 43%; and the average was approximately 52%. See Defendants' Exhibit 1 and stipulation by the parties at hearing of August 31, 1988. In practical terms, third party and independent candidates on average would have a pool of available signers in any given election year to collect signatures from nearly one-half of the registered voters.

The deadline for submission of nominating petitions is restricted in West Virginia to the day before the primary. Courts have upheld election laws with more restrictive deadlines for submission of nominating petitions than found in the West Virginia election laws. See McLain v. Meier, 1988 U.S. App. Lexis 9252 (8th Cir., July 8, 1988) (deadline 55 days before primary upheld); Rainbow Coalition, 740 F.2d at 744-47 (deadline 90 days before the primary upheld); Libertarian Party of Missouri, 764 F.2d at 542 (deadline one week before the primary upheld); Stevenson, 638 F. Supp. at 552-54 (deadline 92-99 days before primary upheld).

In Stoddard v. Quinn, 593 F. Supp. 300 (D. Me. 1984), the district court struck down a requirement under Maine election laws that nominating petitions be submitted 40 days prior to the primary. Id. at 307. But unlike the West Virginia electionlaws, Maine limited the time during which signatures could be collected to the period from January 1 to April 1, "a time when adverse weather conditions prevail in Maine." Id. at 304. More importantly, as the election draws nearer, voter interest heightens, making the thirty days before the primary a crucial period where voter interest is at its highest and correspondingly a candidate's chances to gather signatures during this period are significantly enhanced. By setting the deadline forty days before the primary, Maine in contrast to West Virginia takes this critical period away from its third party and independent candidates clamoring for a place on the ballot. Similarly, the district court's opinion in Cripps, striking down Ohio's preprimary deadline, is distinguishable from the West Virginia election laws in that Ohio, like Maine, forced its third party and independent candidates to gather signatures 75 days before the primary at a time when "[v]olunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign." Anderson, 460 U.S. at 792 (footnote omitted).[10]

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[10] The district court opinion in LaRouche v. Burgio, 594 F. Supp. 614 (D.N.J. 1984), is likewise inapposite in that LaRouche involved striking down New Jersey's filing deadline as applied to third party and independent candidates running for national office. Id. at 616.

West Virginia does not restrict the period of time in which to commence the collection of petitions. Yet, courts have upheld election laws restricting the period of time in which to gather petitions. See American Party, 415 U.S. at 786 (candidates had 55 days to collect petitions); Jenness, 403 U.S. at 433 (candidates limited to 180 days to collect petitions); Libertarian Party of Florida, 710 F.2d at 794 (candidates limited to 188 days to collect petitions).

In order to adequately assess the overall burden imposed under the West Virginia election laws, it is important to consider the number of signatures required in terms of a percentage as well as the raw number itself. West Virginia requires signatures from registered voters totalling 1% of the votes cast in the last election for the specific office sought. Courts have upheld election laws requiring the gathering of similar or higher percentages of signatures. See Munro, 107 S. Ct. 533 (1986) (1% requirement upheld); American Party, 415 U.S. 767 (1974) (1% requirement upheld); Jenness, 403 U.S. 431 (1971) (5% requirement upheld); Storer, 415 U.S. 724 (1974) (5% requirement upheld); Rainbow Coalition, 844 F.2d 740 (10th Cir. 1988) (5% requirement upheld); Hull v. Simcox, 766 F.2d 1171 (7th Cir. 1985) (2% requirement upheld); Libertarian Party of Florida, 710 F.2d 790 (11th Cir. 1983) (3% requirement upheld).

In terms of raw numbers, the largest amount of signatures required to be collected by any of the plaintiffs comes to no more than the 7,222 petitions needed for the office of United States Senator. In McLain, the Eighth Circuit described a similar requirement in North Dakota, a less populated state than West Virginia, of collecting 7,000 signatures as a "relatively small number of required signatures." In Hull, the Seventh Circuit found Indiana's requirement of 22,000 signatures much less burdensome than Florida's requirement of 140,000 signatures upheld in Libertarian Party of Florida, or Texas' requirement of 35,000 signatures upheld in American Party. The court concluded:

> Of course in one sense the more populous the state, the easier it is to get signatures -- there is a larger pool to fish from. On this theory only the percentage should matter, a proposition for which McLain, which invalidated a requirement of only 15,000 signatures, offers some support. But this overlooks a number of things: it costs money to circulate petitions; the more signatures that are required, the higher the cost is; and minor parties usually are strapped for funds.

Hull, 766 F.2d at 1174.

Further, West Virginia imposes no geographical restrictions on where the voters signing the petitions must reside. See Libertarian Party of Missouri, 746 F.2d at 542-43 (Eighth Circuit upheld Missouri's requirement of collecting petitions from 1% of voters in each congressional district or 2% of voters from half of the districts); Libertarian Party of Virginia v. Davis, 766 F.2d at 868-69 (Fourth Circuit upheld Virginia's requirement of collecting petitions from 200 voters in each congressional district).

While it is also true that some courts after Anderson have upheld the constitutionality of preprimary filing deadlines, in none of those cases were the respective courts faced with the additional burden imposed under West Virginia law of forcing voters to choose between signing petitions or voting in the primary. The absence of this added burden was a factor upon which those courts relied in denying the constitutional challenge. McLain, 1988 U.S. App. Lexis 9252 at ¶¶ 10-11; Rainbow Coalition, 844 F.2d at 745-46; Libertarian Party of Missouri, 764 F.2d at 542. Consequently, it appears that plaintiffs' associational rights are to some significant extent burdened by the West Virginia preprimary deadlines when coupled with the forced choice of voters.[11] Thus, under Anderson, the state must justify the burden.

To carry the burden, the defendants assert that requiring all third party and independent candidates to declare their candidacies and submit nominating petitions before the primary helps to ensure that voters are exposed to the full field of candidates and their positions on the issues during the primary election season so as to vote intelligently at the primary polls. The asserted interest of the state in ensuring a full field of candidates and positions during the primary season is a legitimate one.[12] Added to this legitimate interest, the

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[11] Only seven such individuals qualified to be placed on the presidential ballot in the last fifty years. See Note, Ballot Access Laws in West Virginia - A Call for Change, 87 W.Va. L. Rev. 809, 820 (1985).

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[12] The second asserted interest of the state is to combat "intraparty" feuding and promote political stability. The Court in Anderson noted:

> More generally, the early filing deadline is not precisely drawn to protect the parties from "intraparty feuding," whatever legitimacy that state goal may have in a Presidential election. If the deadline is designed to keep intraparty competition within the party structure, its coverage is both too

United States Supreme Court has long recognized the important state interest in requiring third party and independent candidates to make a preliminary showing of significant support before being placed as a candidate on the state's general election ballot. See Munro, 107 S. Ct. at 537. As the Court in Jenness stated:

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot -- the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

Jenness, 403 U.S. at 442. Further, in evaluating these state interests, the Court has "never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." Munro, 107 S. Ct. at 537.

The final task remains of balancing the burdens on the rights of the challengers in securing a place on the general election ballot against the interests of West Virginia in requiring some initial modicum of community support in order to determine whether third parties are offered constitutionally adequate access to the ballot. The task is not one of second-guessing the wisdom of the particular bundle of election scheme procedures and restrictions chosen by the state; surely, the procedures and restrictions contained in any such scheme are to some extent necessarily arbitrary.[13] Rather, the question becomes one of reasonableness. As observed in McLain, the court must determine whether:

> broad and too narrow. It is true that in this case 3513.15.7 was applied to a candidate who had previously competed in party primaries and then sought to run as an independent. But the early deadline applies broadly to independent candidates who have not been affiliated in the recent past with any political party. On the other hand, as long as the decision to run is made before the March deadline, Ohio does not prohibit independent candidacies by persons formerly affili-

> [T]he challenged laws "freeze the status quo by effectively barring all candidates other than those of the major parties,' Libertarian Party, 710 F.2d at 793, or 'could a reasonably diligent [third party] candidate be expected to satisfy the [filing] requirements?" Storer, 415 U.S. at 742.

> ated with a political party, or currently participating in intraparty competition in other States -- regardless of the effect on the political party structure.

Anderson, 460 U.S. at 805. The Court's reasoning in Anderson applies with equal force to the claim by the state of combatting intraparty feuding.

Another asserted state interest is the administrative concerns in having to certify the validity of the submitted petitions. Although the state has a legitimate interest in providing itself a sufficient amount of time to certify the petitions, the state has not justified setting the time far in advance of the general election. Indeed, under 3-5-23(a) the state allows third party and independent candidates running for the offices of president and vice president to submit petitions no later than August 1.

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[13] Under the West Virginia election scheme, third party and independent candidates are in some respects treated more favorably than major party candidates and less so in others. For example, third party and independent candidates are permitted to file their declarations of candidacy as well as submit their fee petitions several months later than major party candidates. 3-5-7, 3-5-8a and 3,5-23(a). On the other hand, political parties polling at least one per cent of the total vote for governor at the last preceding general election may fill vacancies as late as sixty days prior to the general election and, in the event of the death of a nominee, as late as twelve days. 3-1-8, 3-5-19. The parties have not submitted any evidence on the number of vacancies occurring and filled under 3-5-19 from time to time for the offices of Secretary of State, United States Senator and United States Representative for the Third Congressional District. It is noted that a vacancy on the Republican ticket for Secretary of State in this year's general election remains unfilled after the last day expired on September 9, 1988.

1988 U.S. App. Lexis at ¶¶ 15-16. It appears that the burdens placed upon the challengers under West Virginia election laws are not great. In the current election year, the largest number of signatures to be collected amounted to 7,222. Approximately 54% of the registered voters cast ballots this year in the West Virginia primary. Thus, even with the forced choice imposed upon voters in West Virginia, the challengers still had 46% or some 435,000 registered voters from which to solicit signatures. See Defendants' Exhibit No. 1. It is likely that this large pool of 435,000 nonvoters would likely include a substantial number of individuals who would have been reluctant to surrender their right to vote in the primary by signing a nominating petition, at least until they were certain that they would not be casting a ballot on primary day. Yet, the potential pool upon which a challenger may draw remains quite large in relation to the number of signatures needed. Indeed, the challengers made no effort to collect signatures and thus failed in that regard to comply with the "reasonably diligent candidate" standard of Storer.[14] Libertarian Party of Florida, 710 F.2d at 794.

West Virginia has an important interest in requiring third party and independent candidates to demonstrate a modicum of community support before placing their names on its general election ballot. In balancing this strong state interest against the diminished burden placed upon the challengers under the state's election laws, collecting the relatively modest number of signatures required is not, in view of the totality of the design of the laws of West Virginia governing ballot access, an unreasonable imposition nor does it freeze the status quo.

III.

Plaintiffs attack the preprimary deadline for in-lieu of-filing-fee petitions as unconstitutional.[15] The seminal Supreme Court decision on filing

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[14] In the upcoming election, however, the New Alliance Party was able to gather the requisite number of signatures to place its presidential and vice presidential candidates on the general election ballot in West Virginia in accordance with the revised scheme devised by the legislature in 1986 following Anderson. The court concludes that these revised deadlines for the two highest national offices are constitutionally sound.

[15] Section 3-5-8a states:

> A candidate seeking nomination to any office who is unable to pay the filing fee may qualify through the following petition

fees is Lubin v. Panish, 415 U.S. 709 (1974), where the Court was confronted with a challenge to California's filing fee provision as exclusionary for failing to provide an alternative for those candidates seeking ballot access who were unable to pay the fee. The Court recognized on the one hand that states have a legitimate interest in "protecting the integrity of the electoral system from the recognized dangers of ballots listing so many candidates as to undermine the process of giving expression to the will of the majority." Id. at 714. However, candidates unable to pay a fee have a legitimate interest in gaining ballot access. In order to accommodate these two conflicting interests, the Court observed:

> Selection of candidates solely on the basis of ability to pay a fixed fee without providing any alternative means is not reasonably necessary to the accomplishment of the State's legitimate election interests. Accordingly,

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> process in lieu of payment of the filing fee.
>
> The candidate shall file an oath with the appropriate office required under section eight [3-5-8] of this article stating that he is unable to pay the filing fee due to a lack of financial resources. Such oath shall be filed not earlier than the second Monday in January next preceding the primary election day.
>
> Upon receipt of the written oath the receiving officer shall provide the candidate with in-lieu-of-filing-fee petition forms and instructions on gathering the required signatures.
>
> . . . .
>
> Signatures obtained on an in-lieu-of-filing-fee petition shall not be counted toward the number of voters required to sign a nomination certificate in accordance with section twenty-three [3-5-23] of this article.

The candidate shall file all in-lieu-of-filing-fee petitions with the required number of valid signatures with the county clerk or secretary of state, as the case may be, not later than the last date required by law for filing declarations of candidacies and payment of the filing fee.

> we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay. "seriousness" of a candidacy which do not measure the probability of attracting significant voter support solely by the neutral fact of payment of a filing fee. States may, for example, impose on minor political parties the precondition of demonstrating the existence of some reasonable quantum of voter support by requiring such parties to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election. See American Party of Texas v. White, post, p. 767. Similarly, a candidate who establishes that he cannot pay the filing fee required for a place on the primary ballot may be required to demonstrate the "seriousness" of his candidacy by persuading a substantial number of voters sign a petition in his behalf.

Id. at 718-19 (footnote omitted).

Relying on Lubin, the West Virginia Supreme Court of Appeals in Manchin invalidated, as to impecunious candidates, the filing fee provision contained in § 3-5-8 for failure to provide a reasonable alternative for such candidates to obtain ballot access. Manchin, 270 S.E.2d at 639. While awaiting legislative action, then Secretary of State Manchin adopted temporary measures to allow potential candidates to avoid payment of a filing fee by filing a financial hardship statement. The West Virginia Supreme Court of Appeals in Garcelon v. Rutledge, 318 S.E.2d 622 (W. Va. 1984), nullified the temporary measures as unconstitutionally vague. Id. at 625-26. The court opined:

> Both the United States Supreme Court in Lubin v. Panish, 415 U.S. 709, 718-19, 94 S. Ct. 1315, 1321, 39 L.Ed.2d 702, 710 (1974), and this Court in West Virginia

> Libertarian Party, 270 S.E.2d at 639, recognized that nominating petitions provide an attractive alternative to filing fees that advance and protect many of the interests that filing fees are ostensibly designed to advance and protect. Id. at 626.

In response to the court's suggestion, the West Virginia Legislature enacted § 3-5-8a, establishing an alternative for candidates who could not afford to pay the filing fee of 1% of the salary of the office sought. Under § 3-5-8a, the candidates may instead submit in-lieu-of-filing-fee petitions representing four petitions or signatures for each whole dollar of fee. Under the alternative, plaintiff McBride in the current year was required to file 3,580 petitions, plaintiff Gotesky 3,580 petitions, and plaintiff Brady 1,728 petitions.

The issue turns on the reasonableness of the alternative method selected by the legislature. The alternative is rather simple in that the number of signatures required is modest[16] and may be obtained from a pool of all of the registered voters qualified to vote for a given office whether or not those voters cast a ballot in the primary. As applied to third party and independent candidates, the alternative scheme is further eased by permitting the signatures to be collected over a period of some three months extending from the second Monday in January down to a date thirty-one days prior to the primary. On the other hand, major party candidates are given less than a month in which to collect their signatures, beginning the second Monday in January.

Moreover, the defendants concede that third party and independent candidates may, by simultaneously circulating two separate petitions and asking the same voters to sign both a fee and a nominating petition, avoid the prohibition contained in § 3-5-8a against using signatures obtained on a fee petition to be counted towards a nominating petition. As applied to the plaintiffs, the court finds the method selected by the legislature for candidates unable to pay a filing fee to obtain ballot access to be reasonable.

IV.

Accordingly, it is ORDERED that the motion for summary judgment filed by plaintiffs Socialist Workers Party, George Richard McBride, James Kenneth Gotesky, Elvena Elizabeth Brady, Cleve Andrew Pulley and Toba Leah Singer be, and the same hereby is, denied.

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[16] See Cross v. Fong Eu, F. Supp. 1036, 1041 (N.D. Cal. 1978) (court found requirement of gathering 10,000 signatures in lieu of filing a fee to be reasonable).

It is further ORDERED that the motion for partial summary judgment filed by defendants Ken Hechler, Allan Hammock, Barbara Ruley, Ben Bryant and Perry Reed be, and the same hereby is granted.

The Clerk is directed to forward certified copies of this order to all counsel of record.

DATED: September 13, 1988

JOHN T. COPENHAVER, JR.
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

SOCIALIST WORKERS PARTY,
GEORGE RICHARD McBRIDE,
JAMES KENNETH GOTESKY,
ELVENA ELIZABETH BRADY,
CLEVE ANDREW PULLEY,. and
TOBA LEAH SINGER,

Plaintiffs,

v. Civil Action No. 2:88-0499

KEN HECHLER, in his official
capacities as Secretary of State
of West Virginia and Member, State
Election Commission Office of
Secretary of State; ALLAN HAMMOCK,
in his official capacity as Member,
State Election Commission Office of
Secretary of State; BARBARA RULEY,
in her official capacity as Member,
State Election Commission Office of
Secretary of State; BEN BRYANT, in his official capacity as Member,
State Election Commission Office of Secretary of State; and PERRY
REED, in his official capacity as Member,
State Election Commission Office of Secretary of State,

Defendants.

JUDGMENT ORDER

Pursuant to the memorandum order this day entered in the above-styled civil action, it is ORDERED that judgment be entered upholding the constitutionality of Sections 3-5-8a, 3-5-23(a), (c), (d) and 3-5-24 of the West Virginia Code under the First and Fourteenth Amendments as applied individually and collectively against plaintiffs Socialist Workers Party, George Richard McBride, James Kenneth Gotesky, Elvena Elizabeth Brady, Cleve Andrew Pulley and Toba Leah Singer.

The Clerk is directed to forward certified copies of this order to all counsel of record.

DATED: September 13, 1988

JOHN T. COPENHAVER, JR.
United States District Judge

Appendix D

SELECTED PROVISIONS OF WEST VIRGINIA ELECTION LAWS

[All references are to West Virginia Code.]

§ 3-5-8. Filing fees and their disposition.

Every person who becomes a candidate for nomination for or election to office in any primary election, shall, at the time of filing the certificate of announcement as required in this article, pay a filing fee as follows:

(a) A candidate for president of the United States, for vice-president of the United States, for United States senator, for member of the United States house of representatives, for governor and for all other state elective officers shall pay a fee equivalent to one percent of the annual salary of the office for which the candidate announces;

. . . .

§ 3-5-8a. Nominating petitions as alternatives to filing fees; oath of impecuniosity required; petition in lieu of payment of filing fee.

A candidate seeking nomination to any office who is unable to pay the filing fee may qualify through the following petition process in lieu of payment of the filing fee.

The candidate shall file with the appropriate office required under section eight [§ 3-5-8] of this article stating that he is unable to pay the filing fee due to a lack of financial resources. Such oath shall be filed not earlier than the second Monday in January next preceding the primary election day.

Upon receipt of the written oath the receiving officer shall provide the candidate with in-lieu-of-filing-fee petition forms and instructions on gathering the required signatures. The number of required signatures shall be four qualified voters for each whole dollar of the filing fee: Provided, That the filing fee shall be waived in whole and not in part. Only signatures of voters registered in the county, district or other political division represented by the office sought may be solicited. Solicitors of signatures shall also be residents of the county, district or other geographical entity represented by the office sought: Provided, however, That for offices to be filled by the voters of more than one county, separate petition forms shall be used for the signatures of qualified voters from each county.

No qualified voter forfeits his or her opportunity to vote in the primary election by signing an in-lieu-of-filing-fee petition.

. . . .

Signatures obtained on an in-lieu-of-filing-fee petition shall not be counted toward the number of voters required to sign a nomination certificate in accordance with section twenty-three [§ 3-5-23] of this article.

The candidate shall file all in-lieu-of-filing-fee petitions with the required number of valid signatures with the county clerk or secretary of state, as the case may be, not later than the last date required by law for filing declarations of candidacies and payment of the filing fee.

. . . .

§ 3-5-19. Vacancies in nominations; how filled; fees.

If any vacancy shall occur in the party nomination of candidates for office, caused by the withdrawal, failure to make a nomination for the office at the primary election, or otherwise, it may be filled and the name of the candidate certified by the executive committee of the political party for the political division in which the vacancy occurs. If such vacancy he not filled by the executive committee by the sixty-fifth day next preceding the date of the election, it shall be lawful for the chairman of the political party executive committee for the political division to fill such vacancy, make a certificate thereof, and file the same with the officer with whom the original certificate of nomination was or might have been regularly filed. Such certificate shall be filed not later than the sixtieth day next preceding the date of the election and, when filed, such officer shall proceed therewith in the same manner in all respects as in cases of original nominations. When any such vacancy exists because of failure to make a nomination for the office at the primary election, no nomination for such office shall be deemed filed under provisions of this section until the required filing fee for such office candidacy shall have been paid as provided in section eight [§ 3-5-8] of this article.

. . . .

§ 3-5-23. Certificate nominations; requirements and control; penalties.

(a) Groups of citizens having no party organization may nominate candidates for public office otherwise than by conventions or primary elections. In such case, the candidate or candidates, jointly or severally, shall file a declaration with the secretary of state if the office is to be filled by the voters of more than one county, or with the clerk of the circuit court of the county if the office is to be filled by the voters of one county or political subdivision thereof; such declaration to be filed at least thirty days prior to the time of filing the certificate provided by section twenty-four [§ 3-5-24] of this article: Provided, That the deadline for filing the certificate for persons seeking ballot access as a candidate for the office of president or vice president shall be filed not later than the first day of August preceding the general

election. At the time of filing of such declaration each candidate shall pay the filing fee required by law, and if such declaration is not so filed or the filing fee so paid, the certificate shall not be received by the secretary of state, or clerk of the circuit court, as the case may be.

(b) The person or persons soliciting or canvassing signatures of duly qualified voters of such certificate or certificates, may solicit or canvass duly registered voters residing within the county, district, or other political division represented by the office sought, but must first obtain from the clerk of the county commission credentials which must beexhibited to each voter canvasses or solicited, ...

(c) The certificate shall be personally signed by duly registered voters, in their own proper handwriting or by their marks duly witnessed, who must be residents within the county, district or other political division represented by the office sought wherein such canvass or solicitation is made by the person or persons duly authorized. Such signatures need not all be on one certificate. The number of such signatures shall be equal to not less than one percent of the entire vote cast at the last preceding general election for the office in the state, district, county or other political division for which the nomination is to be made, but in no event shall the number be less than twenty-five. Where two or more nominations may be made for the same office, the total of the votes cast at the last preceding general election for the candidates receiving the highest number of votes on each ticket for such office shall constitute the entire vote. No signature on such certificate shall be counted unless it be that of a duly registered voter of the county, district or other political division represented by the office sought wherein such certificate was presented. It shall be the duty of those soliciting signatures to read to each voter whose signature is solicited the statement written on the certificate which gives notice that no person signing such certificate shall vote at any primary election to be held to nominate candidates for office to be voted for at the election to be held next after the date of signing such certificate.

(d) Such certificates shall state the name and residence of each of such candidates; that he is legally qualified to hold such office; that the subscribers are legally qualified and duly registered as voters and desire to vote for such candidates; and may designate, by not more than five words, a brief name of the party which such candidates represent and may adopt a device or emblem to be printed on the official ballot. All candidates nominated by the signing of such certificates shall have their names placed on the official ballot as candidates, as if otherwise nominated under the provisions of this chapter.

The secretary of state shall prescribe the form and content of the nomination certificates to be used for soliciting signatures. The content shall include the language to be used in giving written and oral notice to each voter that signing of the nominating certificate forfeits that voter's right to vote in the corresponding primary election.

Offices to be filled by the voters of more than one county shall use separate petition forms for the signatures of qualified voters for each county.

(e) The secretary of state, or the clerk of the circuit court, as the case may be, may investigate the validity of such certificates and the signatures thereon, and if upon such investigation there may no doubt as to the legitimacy and the validity of such certificate, he may request the attorney general of the state, or the prosecuting attorney of the county, to institute a quo warranto proceeding against the nominee ornominees by certificate to determine his or their right to such nomination to public office, and upon request being made, the attorney general or prosecuting attorney shall institute such quo warranto proceeding.

(f) Any person violating the provisions hereof, in addition to penalties prescribed elsewhere for violation of this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not more than one thousand dollars, or confined in the county jail for not more than one year, or both, in the discretion of the court. (1915, c. 26; 1916, 3rd Ex. Sess., c. 5; 1919, c. 78, § 23; Code 1923, c. 3, § 26a(3), (23); 1941, c. 40; 1963, c. 64; 1986, c. 76.)

§ 3-5-24.Filing of nomination certificates; time.

All certificates nominating candidates for office under the preceding section [§ 3-5-23], including a candidate for the office of presidential elector, shall be filed, in the case of a candidate to be voted for by the voters of the entire state or by any subdivision thereof other than a single county, with the secretary of state, and in the case of all candidates for county and magisterial district offices, including all offices to be filled by the voters of a single county, with the clerk of the circuit court of the county, not later than the day preceding the date on which the primary election is held. After such date no such certificate shall be received by such officers. (1915, c. 26; 1916, 3rd Ex. Sess., c. 5; 1919, c. 78; Code 1923, c. 3,
§ 26a(23); 1963, c. 64.)